

Contractual Tying”—the company may not condition its grant of a Windows license on a party’s agreement “to license, promote, or distribute any other Microsoft software product.” *Id.* And § 3.g imposes a “Restriction on Binding Middleware Products to Operating System Products” unless Microsoft also offers consumers “an otherwise identical version” of the operating system without the middleware. *Id.*

B. Trial Proceedings

Microsoft’s first contention—that the District Court erred by adopting an expedited trial schedule and receiving evidence through summary witnesses—is easily disposed of. Trial courts have extraordinarily broad discretion to determine the manner in which they will conduct trials. “This is particularly true in a case such as the one at bar where the proceedings are being tried to the court without a jury.” *Eli Lilly & Co., Inc. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972). In such cases, “[a]n appellate court will not interfere with the trial court’s exercise of its discretion to control its docket and dispatch its business . . . except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.” *Id.* Microsoft fails to clear this high hurdle. Although the company claims that setting an early trial date inhibited its ability to conduct discovery, it never identified a specific deposition or document it was unable to obtain. And while Microsoft now argues that the use of summary witnesses made inevitable the improper introduction of hearsay evidence, the company actually agreed to the District Court’s proposal to limit each side to 12 summary witnesses. 12/2/98 am Tr. at 11, reprinted in 21 J.A. at 14083 (court admonishing Microsoft’s counsel to “[k]eep in mind that both sides agreed to the number of witnesses”). Even absent Microsoft’s agreement, the company’s challenge fails to show that this use of summary witnesses falls outside the trial court’s wide latitude to receive evidence as it sees fit. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141–42 (1997). This is particularly true given the presumption that a judge who conducts a bench trial has ignored any inadmissible evidence, *Harris v. Rivera*, 454 U.S. 339, 346 (1981)—a presumption that Micro-

soft makes no serious attempt to overcome. Indeed, under appropriate circumstances with appropriate instructions, we have in the past approved the use of summary witnesses even in jury trials. See, e.g., *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983). Therefore, neither the use of the summary witnesses nor any other aspect of the District Court's conduct of the trial phase amounted to an abuse of discretion.

C. Failure to Hold an Evidentiary Hearing

The District Court's remedies-phase proceedings are a different matter. It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary "to the spirit which imbues our judicial tribunals prohibiting decision without hearing." *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947).

A party has the right to judicial resolution of disputed facts not just as to the liability phase, but also as to appropriate relief. "Normally, an evidentiary hearing is required before an injunction may be granted." *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983); see also *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) ("Generally the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." (citation and internal quotation marks omitted)). Other than a temporary restraining order, no injunctive relief may be entered without a hearing. See generally FED. R. CIV. P. 65. A hearing on the merits—i.e., a trial on liability—does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability, or unless there are no disputed factual issues regarding the matter of relief.

This rule is no less applicable in antitrust cases. The Supreme Court "has recognized that a 'full exploration of facts' is usually necessary in order (for the District Court) properly to draw (an antitrust) decree' so as 'to prevent future violations and eradicate existing evils.'" *United States*

v. Ward Baking Co., 376 U.S. 327, 330–31 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 22 (1945)). Hence a remedies decree must be vacated whenever there is “a bona fide disagreement concerning substantive items of relief which could be resolved only by trial.” *Id.* at 334; *cf. Sims*, 161 F.2d at 89 (“It has never been supposed that a temporary injunction could issue under the Clayton Act without giving the party against whom the injunction was sought an opportunity to present evidence on his behalf.”).

Despite plaintiffs’ protestations, there can be no serious doubt that the parties disputed a number of facts during the remedies phase. In two separate offers of proof, Microsoft identified 23 witnesses who, had they been permitted to testify, would have challenged a wide range of plaintiffs’ factual representations, including the feasibility of dividing Microsoft, the likely impact on consumers, and the effect of divestiture on shareholders. To take but two examples, where plaintiffs’ economists testified that splitting Microsoft in two would be socially beneficial, the company offered to prove that the proposed remedy would “cause substantial social harm by raising software prices, lowering rates of innovation and disrupting the evolution of Windows as a software development platform.” Defendant’s Offer of Proof at 6, *reprinted in* 4 J.A. at 2747. And where plaintiffs’ investment banking experts proposed that divestiture might actually increase shareholder value, Microsoft proffered evidence that structural relief “would inevitably result in a significant loss of shareholder value,” a loss that could reach “tens—possibly hundreds—of billions of dollars.” *Id.* at 19, *reprinted in* 4 J.A. at 2760.

Indeed, the District Court itself appears to have conceded the existence of acute factual disagreements between Microsoft and plaintiffs. The court acknowledged that the parties were “sharply divided” and held “divergent opinions” on the likely results of its remedies decree. *Final Judgment*, at 62. The reason the court declined to conduct an evidentiary hearing was not because of the absence of disputed facts, but because it believed that those disputes could be resolved only through “actual experience,” not further proceedings. *Id.*

But a prediction about future events is not, as a prediction, any less a factual issue. Indeed, the Supreme Court has acknowledged that drafting an antitrust decree by necessity “involves predictions and assumptions concerning future economic and business events.” *Ford Motor Co. v. United States*, 405 U.S. 562, 578 (1972). Trial courts are not excused from their obligation to resolve such matters through evidentiary hearings simply because they consider the bedrock procedures of our justice system to be “of little use.” *Final Judgment*, at 62.

The presence of factual disputes thus distinguishes this case from the decisions plaintiffs cite for the proposition that Microsoft was not entitled to an evidentiary hearing. Indeed, far from assisting plaintiffs, these cases actually confirm the proposition that courts must hold evidentiary hearings when they are confronted with disputed facts. In *Ford Motor Co.*, the Supreme Court affirmed a divestiture order after emphasizing that the District Court had “held nine days of hearings on the remedy.” 405 U.S. at 571. In *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999), the defendant both failed to submit any offers of proof, and waived its right to an evidentiary hearing by expressly agreeing that relief should be determined based solely on written submissions. *Id.* at 1142–43. The defendants in *American Can Co. v. Mansukhani*, 814 F.2d 421 (7th Cir. 1987), were not entitled to a hearing on remedies because they failed “to explain to the district court what new proof they would present to show” that the proposed remedy was unwarranted. *Id.* at 425. And in *Socialist Workers Party v. Illinois State Board of Elections*, 566 F.2d 586 (7th Cir. 1977), *aff’d*, 440 U.S. 173 (1979), the Seventh Circuit held that a remedies-specific hearing was unnecessary because that case involved a pure question of legal interpretation and hence “[t]here was no factual dispute as to the ground on which the injunction was ordered.” *Id.* at 587.

Unlike the parties in *Davoll*, *American Can*, and *Socialist Workers Party*, Microsoft both repeatedly asserted its right to an evidentiary hearing and submitted two offers of proof. The company’s “summary response” to the proposed remedy argued that it would be “impossible” to address underlying

factual issues “on a highly expedited basis,” Defendant’s Summary Response at 6–7, *reprinted in* 4 J.A. at 2587–88, and Microsoft further maintained that the court could not issue a decree unless it first permitted “substantial discovery, adequate time for preparation and a full trial on relief.” Defendant’s Position as to Future Proceedings at 2, *reprinted in* 4 J.A. at 2646. And in 53 pages of submissions, Microsoft identified the specific evidence it would introduce to challenge plaintiffs’ representations.

Plaintiffs further argue—and the District Court held—that no evidentiary hearing was necessary given that Microsoft long had been on notice that structural relief was a distinct possibility. It is difficult to see why this matters. Whether Microsoft had advance notice that dissolution was in the works is immaterial to whether the District Court violated the company’s procedural rights by ordering it without an evidentiary hearing. To be sure, “claimed surprise at the district court’s decision to consider permanent injunctive relief does not, alone, merit reversal.” *Socialist Workers*, 566 F.2d at 587. But in this case, Microsoft’s professed surprise does not stand “alone.” There is something more: the company’s basic procedural right to have disputed facts resolved through an evidentiary hearing.

In sum, the District Court erred when it resolved the parties’ remedies-phase factual disputes by consulting only the evidence introduced during trial and plaintiffs’ remedies-phase submissions, without considering the evidence Microsoft sought to introduce. We therefore vacate the District Court’s final judgment, and remand with instructions to conduct a remedies-specific evidentiary hearing.

D. Failure to Provide an Adequate Explanation

We vacate the District Court’s remedies decree for the additional reason that the court has failed to provide an adequate explanation for the relief it ordered. The Supreme Court has explained that a remedies decree in an antitrust case must seek to “unfetter a market from anticompetitive conduct,” *Ford Motor Co.*, 405 U.S. at 577, to “terminate the illegal monopoly, deny to the defendant the fruits of its

statutory violation, and ensure that there remain no practices likely to result in monopolization in the future,” *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966).

The District Court has not explained how its remedies decree would accomplish those objectives. Indeed, the court devoted a mere four paragraphs of its order to explaining its reasons for the remedy. They are: (1) Microsoft “does not yet concede that any of its business practices violated the Sherman Act”; (2) Microsoft “continues to do business as it has in the past”; (3) Microsoft “has proved untrustworthy in the past”; and (4) the Government, whose officials “are by reason of office obliged and expected to consider—and to act in—the public interest,” won the case, “and for that reason alone have some entitlement to a remedy of their choice.” *Final Judgment*, at 62–63. Nowhere did the District Court discuss the objectives the Supreme Court deems relevant.

E. Modification of Liability

Quite apart from its procedural difficulties, we vacate the District Court’s final judgment in its entirety for the additional, independent reason that we have modified the underlying bases of liability. Of the three antitrust violations originally identified by the District Court, one is no longer viable: attempted monopolization of the browser market in violation of Sherman Act § 2. One will be remanded for liability proceedings under a different legal standard: unlawful tying in violation of § 1. Only liability for the § 2 monopoly-maintenance violation has been affirmed—and even that we have revised. Ordinarily, of course, we review the grant or denial of equitable relief under the abuse of discretion standard. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931–32 (1975) (“[T]he standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion.”). For obvious reasons, the application of that standard is not sufficient to sustain the remedy in the case before us. We cannot determine whether the District Court has abused its discretion in remedying a wrong where the court did not

exercise that discretion in order to remedy the properly determined wrong. That is, the District Court determined that the conduct restrictions and the pervasive structural remedy were together appropriate to remedy the three antitrust violations set forth above. The court did not exercise its discretion to determine whether all, or for that matter, any, of those equitable remedies were required to rectify a § 2 monopoly maintenance violation taken alone. We therefore cannot sustain an exercise of discretion not yet made.

By way of comparison, in *Spectrum Sports, Inc. v. McQuillean*, 506 U.S. 447 (1993), the Supreme Court reviewed a damages award in a Sherman Act case. In that case, the trial court entered judgment upon a jury verdict which did not differentiate among multiple possible theories of liability under § 2. The Supreme Court ultimately determined that the trial record could not legally support a finding that the defendant had committed an illegal attempt to monopolize, and that “the trial instructions allowed the jury to infer specific intent and dangerous probability of success from the defendants’ predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market.” *Id.* at 459. Therefore, the High Court reversed the Ninth Circuit’s judgment affirming the District Court and remanded for further proceedings, expressly because “the jury’s verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize grounds alone....” *Id.* Similarly, here, we cannot presume that a District Court would exercise its discretion to fashion the same remedy where the erroneous grounds of liability were stripped from its consideration.

The Eighth Circuit confronted a similar problem in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), *cert. denied*, 121 S. Ct. 428 (2000). In that case, a group of boat builders brought an action against an engine manufacturer alleging violations of Sherman Act §§ 1 and 2, and Clayton Act § 7. After a 10-week trial, the jury found Brunswick liable on all three counts and returned a verdict for over \$44 million. On appeal, the Eighth Circuit reversed the Clayton Act claim. *Id.* at 1053. That court held that, as

a consequence, it was required to vacate the jury's remedy in its entirety. Because the "verdict form did not require the jury to consider what damages resulted from each type of violation," the court could not "know what damages it found to have been caused by the acquisitions upon which the Section 7 claims were based." *Id.* at 1054. The court rejected the proposition that "the entire damage award may be upheld based on Brunswick's Sherman Act liability alone," *id.* at 1053, holding that, because "there is no way to know what damages the jury assigned to the Section 7 claims," the defendant "would be entitled at the very least to a new damages trial on the boat builders' Sherman Act claims," *id.* at 1054.

Spectrum Sports and *Concord Boat* are distinguishable from the case before us in that both involved the award of money damages rather than equitable relief. Nonetheless, their reasoning is instructive. A court in both contexts must base its relief on some clear "indication of a significant causal connection between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended." 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 653(b), at 91-92 (1996). In a case such as the one before us where sweeping equitable relief is employed to remedy multiple violations, and some—indeed most—of the findings of remediable violations do not withstand appellate scrutiny, it is necessary to vacate the remedy decree since the implicit findings of causal connection no longer exist to warrant our deferential affirmance.

In short, we must vacate the remedies decree in its entirety and remand the case for a new determination. This court has drastically altered the District Court's conclusions on liability. On remand, the District Court, after affording the parties a proper opportunity to be heard, can fashion an appropriate remedy for Microsoft's antitrust violations. In particular, the court should consider which of the decree's conduct restrictions remain viable in light of our modification of the original liability decision. While the task of drafting the remedies decree is for the District Court in the first instance, because

of the unusually convoluted nature of the proceedings thus far, and a desire to advance the ultimate resolution of this important controversy, we offer some further guidance for the exercise of that discretion.

F. On Remand

As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful. *See, e.g., Woerner v. United States Small Bus. Admin.*, 934 F.2d 1277, 1279 (D.C. Cir. 1991) (recognizing that an appellate court reviews a trial court's decision whether or not to grant equitable relief only for an abuse of discretion). This is no less true in antitrust cases. *See, e.g., Ford Motor Co.*, 405 U.S. at 573 ("The District Court is clothed with 'large discretion' to fit the decree to the special needs of the individual case."); *Md. & Va. Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458, 473 (1960) ("The formulation of decrees is largely left to the discretion of the trial court...."). And divestiture is a common form of relief in successful antitrust prosecutions: it is indeed "the most important of antitrust remedies." *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961).

On remand, the District Court must reconsider whether the use of the structural remedy of divestiture is appropriate with respect to Microsoft, which argues that it is a unitary company. By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture "has traditionally been the remedy for Sherman Act violations whose heart is intercorporate *combination and control*," *du Pont*, 366 U.S. at 329 (emphasis added), and that "[c]omplete divestiture is particularly appropriate where asset or stock *acquisitions* violate the antitrust laws," *Ford Motor Co.*, 405 U.S. at 573 (emphasis added).

One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the court explained in *United States v. ALCOA*, 91 F. Supp.

333, 416 (S.D.N.Y. 1950), a “corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency.” A corporation that has expanded by acquiring its competitors often has preexisting internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities preexisted to create a template for such division as the court might later decree. With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in *United Shoe*:

United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.

United States v. United Shoe Machine Co., 110 F. Supp. 295, 348 (D. Mass. 1953).

Depending upon the evidence, the District Court may find in a remedies proceeding that it would be no easier to split Microsoft in two than United Shoe in three. Microsoft’s Offer of Proof in response to the court’s denial of an evidentiary hearing included proffered testimony from its President and CEO Steve Ballmer that the company “is, and always has been, a unified company without free-standing business units. Microsoft is not the result of mergers or acquisitions.” Microsoft further offered evidence that it is “not organized along product lines,” but rather is housed in a single corporate headquarters and that it has

only one sales and marketing organization which is responsible for selling all of the company’s products, one basic research organization, one product support organization, one operations department, one information technology department, one facilities department, one purchasing department, one human resources department,

one finance department, one legal department and one public relations department.

Defendant's Offer of Proof at 23–26, *reprinted in* 4 J.A. at 2764–67. If indeed Microsoft is a unitary company, division might very well require Microsoft to reproduce each of these departments in each new entity rather than simply allocate the differing departments among them.

In devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market. "Mere existence of an exclusionary act does not itself justify full feasible relief against the monopolist to create maximum competition." 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 650a, at 67. Rather, structural relief, which is "designed to eliminate the monopoly altogether . . . require[s] a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of the market power." *Id.* ¶ 653b, at 91–92 (emphasis added). Absent such causation, the antitrust defendant's unlawful behavior should be remedied by "an injunction against continuation of that conduct." *Id.* ¶ 650a, at 67.

As noted above, *see supra* Section II.C, we have found a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference. *See* 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 653(b), at 91–92 (suggesting that "more extensive equitable relief, particularly remedies such as divestiture designed to eliminate the monopoly altogether, . . . require a clearer indication of significant causal connection between the conduct and creation or maintenance of the market power"). Indeed, the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior. *Findings of Fact* ¶ 411 ("There is insufficient evidence to find that, absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems."). If the court on remand is unconvinced of the causal connection between Microsoft's

exclusionary conduct and the company's position in the OS market, it may well conclude that divestiture is not an appropriate remedy.

While we do not undertake to dictate to the District Court the precise form that relief should take on remand, we note again that it should be tailored to fit the wrong creating the occasion for the remedy.

G. Conclusion

In sum, we vacate the District Court's remedies decree for three reasons. First, the District Court failed to hold an evidentiary hearing despite the presence of remedies-specific factual disputes. Second, the court did not provide adequate reasons for its decreed remedies. Finally, we have drastically altered the scope of Microsoft's liability, and it is for the District Court in the first instance to determine the propriety of a specific remedy for the limited ground of liability which we have upheld.

VI. JUDICIAL MISCONDUCT

Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to "avoid public comment on the merits of [] pending or impending" cases. Canon 2 tells judges to "avoid impropriety and the appearance of impropriety in all activities," on the bench and off. Canon 3A(4) forbids judges to initiate or consider *ex parte* communications on the merits of pending or impending proceedings. Section 455(a) of the Judicial Code requires judges to recuse themselves when their "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

All indications are that the District Judge violated each of these ethical precepts by talking about the case with reporters. The violations were deliberate, repeated, egregious, and flagrant. The only serious question is what consequences should follow. Microsoft urges us to disqualify the District Judge, vacate the judgment in its entirety and toss out the

findings of fact, and remand for a new trial before a different District Judge. At the other extreme, plaintiffs ask us to do nothing. We agree with neither position.

A. The District Judge's Communications with the Press

Immediately after the District Judge entered final judgment on June 7, 2000, accounts of interviews with him began appearing in the press. Some of the interviews were held after he entered final judgment. See Peter Spiegel, *Microsoft Judge Defends Post-trial Comments*, FIN. TIMES (London), Oct. 7, 2000, at 4; John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue—In an Interview, Jackson Says Microsoft Did the Damage to Its Credibility in Court*, WALL ST. J., June 8, 2000, at A1. The District Judge also aired his views about the case to larger audiences, giving speeches at a college and at an antitrust seminar. See James V. Grimaldi, *Microsoft Judge Says Ruling at Risk; Every Trial Decision Called 'Vulnerable'*, WASH. POST, Sept. 29, 2000, at E1; Alison Schmauch, *Microsoft Judge Shares Experiences*, THE DARTMOUTH ONLINE, Oct. 3, 2000.

From the published accounts, it is apparent that the Judge also had been giving secret interviews to select reporters before entering final judgment—in some instances long before. The earliest interviews we know of began in September 1999, shortly after the parties finished presenting evidence but two months before the court issued its Findings of Fact. See Joel Brinkley & Steve Lohr, *U.S. vs. Microsoft: Pursuing a Giant; Retracing the Missteps in the Microsoft Defense*, N.Y. TIMES, June 9, 2000, at A1. Interviews with reporters from the *New York Times* and Ken Auletta, another reporter who later wrote a book on the Microsoft case, continued throughout late 1999 and the first half of 2000, during which time the Judge issued his Findings of Fact, Conclusions of Law, and Final Judgment. See *id.*; Ken Auletta, *Final Offer*, THE NEW YORKER, Jan. 15, 2001, at 40. The Judge “embargoed” these interviews; that is, he insisted that the fact and content of the interviews remain secret until he issued the Final Judgment.

Before we recount the statements attributed to the District Judge, we need to say a few words about the state of the

record. All we have are the published accounts and what the reporters say the Judge said. Those accounts were not admitted in evidence. They may be hearsay. See FED. R. EVID. 801(c); *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (“We seriously question whether a New York Times article is admissible evidence of the truthfulness of its contents.”).

We are of course concerned about granting a request to disqualify a federal judge when the material supporting it has not been admitted in evidence. Disqualification is never taken lightly. In the wrong hands, a disqualification motion is a procedural weapon to harass opponents and delay proceedings. If supported only by rumor, speculation, or innuendo, it is also a means to tarnish the reputation of a federal judge.

But the circumstances of this case are most unusual. By placing an embargo on the interviews, the District Judge ensured that the full extent of his actions would not be revealed until this case was on appeal. Plaintiffs, in defending the judgment, do not dispute the statements attributed to him in the press; they do not request an evidentiary hearing; and they do not argue that Microsoft should have filed a motion in the District Court before raising the matter on appeal. At oral argument, plaintiffs all but conceded that the Judge violated ethical restrictions by discussing the case in public: “On behalf of the governments, I have no brief to defend the District Judge’s decision to discuss this case publicly while it was pending on appeal, and I have no brief to defend the judge’s decision to discuss the case with reporters while the trial was proceeding, even given the embargo on any reporting concerning those conversations until after the trial.” 02/27/01 Ct. Appeals Tr. at 326.

We must consider too that the federal disqualification provisions reflect a strong federal policy to preserve the actual and apparent impartiality of the federal judiciary. Judicial misconduct may implicate that policy regardless of the means by which it is disclosed to the public. Cf. *The Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir.

1991) (taking judicial notice of newspaper articles to ascertain whether a fact was within public knowledge). Also, in our analysis of the arguments presented by the parties, the specifics of particular conversations are less important than their cumulative effect.

For these reasons we have decided to adjudicate Microsoft's disqualification request notwithstanding the state of the record. The same reasons also warrant a departure from our usual practice of declining to address issues raised for the first time on appeal: the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); accord *Hormel v. Helvering*, 312 U.S. 552, 556–57 (1941); *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 605–06 (D.C. Cir. 1998). We will assume the truth of the press accounts and not send the case back for an evidentiary hearing on this subject. We reach no judgment on whether the details of the interviews were accurately recounted.

The published accounts indicate that the District Judge discussed numerous topics relating to the case. Among them was his distaste for the defense of technological integration—one of the central issues in the lawsuit. In September 1999, two months before his Findings of Fact and six months before his Conclusions of Law, and in remarks that were kept secret until after the Final Judgment, the Judge told reporters from the *New York Times* that he questioned Microsoft's integration of a web browser into Windows. Stating that he was "not a fan of integration," he drew an analogy to a 35-millimeter camera with an integrated light meter that in his view should also be offered separately: "You like the convenience of having a light meter built in, integrated, so all you have to do is press a button to get a reading. But do you think camera makers should also serve photographers who want to use a separate light meter, so they can hold it up, move it around?" *JOEL BRINKLEY & STEVE LOHR, U.S. v. MICROSOFT* 263 (2001). In other remarks, the Judge commented on the integration at the heart of the case: "[I]t was

quite clear to me that the motive of Microsoft in bundling the Internet browser was not one of consumer convenience. The evidence that this was done for the consumer was not credible. . . . The evidence was so compelling that there was an ulterior motive.” Wilke, *WALL ST. J.* As for tying law in general, he criticized this court’s ruling in the consent decree case, saying it “was wrongheaded on several counts” and would exempt the software industry from the antitrust laws. *BRINKLEY & LOHR, U.S. v. MICROSOFT* 78, 295; Brinkley & Lohr, *N.Y. TIMES*.

Reports of the interviews have the District Judge describing Microsoft’s conduct, with particular emphasis on what he regarded as the company’s prevarication, hubris, and impenitence. In some of his secret meetings with reporters, the Judge offered his contemporaneous impressions of testimony. He permitted at least one reporter to see an entry concerning Bill Gates in his “oversized green notebook.” KEN AULETTA, *WORLD WAR 3.0*, at 112 (2001). He also provided numerous after-the-fact credibility assessments. He told reporters that Bill Gates’ “testimony is inherently without credibility” and “[i]f you can’t believe this guy, who else can you believe?” *BRINKLEY & LOHR, U.S. v. MICROSOFT* 278; Brinkley & Lohr, *N.Y. TIMES*; *see also* Auletta, *THE NEW YORKER*, at 40. As for the company’s other witnesses, the Judge is reported as saying that there “were times when I became impatient with Microsoft witnesses who were giving speeches.” “[T]hey were telling me things I just flatly could not credit.” Brinkley & Lohr, *N.Y. TIMES*. In an interview given the day he entered the break-up order, he summed things up: “Falsus in uno, falsus in omnibus”: “Untrue in one thing, untrue in everything.” “I don’t subscribe to that as absolutely true. But it does lead one to suspicion. It’s a universal human experience. If someone lies to you once, how much else can you credit as the truth?” Wilke, *WALL ST. J.*

According to reporter Auletta, the District Judge told him in private that, “I thought they [Microsoft and its executives] didn’t think they were regarded as adult members of the community. I thought they would learn.” AULETTA, *WORLD WAR 3.0*, at 14. The Judge told a college audience that “Bill

Gates is an ingenious engineer, but I don't think he is that adept at business ethics. He has not yet come to realise things he did (when Microsoft was smaller) he should not have done when he became a monopoly." Spiegel, *FIN. TIMES*. Characterizing Gates' and his company's "crime" as hubris, the Judge stated that "[i]f I were able to propose a remedy of my devising, I'd require Mr. Gates to write a book report" on Napoleon Bonaparte, "[b]ecause I think [Gates] has a Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success, with no leavening hard experience, no reverses." Auletta, *THE NEW YORKER*, at 41; *see also* AULETTA, *WORLD WAR 3.0*, at 397. The Judge apparently became, in Auletta's words, "increasingly troubled by what he learned about Bill Gates and couldn't get out of his mind the group picture he had seen of Bill Gates and Paul Allen and their shaggy-haired first employees at Microsoft." The reporter wrote that the Judge said he saw in the picture "a smart-mouthed young kid who has extraordinary ability and needs a little discipline. I've often said to colleagues that Gates would be better off if he had finished Harvard." AULETTA, *WORLD WAR 3.0*, at 168-69; *see also* Auletta, *THE NEW YORKER*, at 46 (reporting the District Judge's statement that "they [Microsoft and its executives] don't act like grown-ups!" "[T]o this day they continue to deny they did anything wrong.").

The District Judge likened Microsoft's writing of incriminating documents to drug traffickers who "never figure out that they shouldn't be saying certain things on the phone." BRINKLEY & LOHR, *U.S. v. MICROSOFT* 6; Brinkley & Lohr, *N.Y. TIMES*. He invoked the drug trafficker analogy again to denounce Microsoft's protestations of innocence, this time with a reference to the notorious Newton Street Crew that terrorized parts of Washington, D.C. Reporter Auletta wrote in *The New Yorker* that the Judge

went as far as to compare the company's declaration of innocence to the protestations of gangland killers. He was referring to five gang members in a racketeering, drug-dealing, and murder trial that he had presided over

four years earlier. In that case, the three victims had had their heads bound with duct tape before they were riddled with bullets from semi-automatic weapons. "On the day of the sentencing, the gang members maintained that they had done nothing wrong, saying that the whole case was a conspiracy by the white power structure to destroy them," Jackson recalled. "I am now under no illusions that miscreants will realize that other parts of society will view them that way."

Auletta, *THE NEW YORKER*, at 40–41; AULETTA, *WORLD WAR 3.0*, at 369–70 (same); *see also* Auletta, *THE NEW YORKER*, at 46.

The District Judge also secretly divulged to reporters his views on the remedy for Microsoft's antitrust violations. On the question whether Microsoft was entitled to any process at the remedy stage, the Judge told reporters in May 2000 that he was "not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." Brinkley & Lohr, *N.Y. TIMES*. Another reporter has the Judge asking "[w]ere the Japanese allowed to propose terms of their surrender?" Spiegel, *FIN. TIMES*. The District Judge also told reporters the month before he issued his break-up order that "[a]ssuming, as I think they are, [] the Justice Department and the states are genuinely concerned about the public interest," "I know they have carefully studied all the possible options. This isn't a bunch of amateurs. They have consulted with some of the best minds in America over a long period of time." "I am not in a position to duplicate that and re-engineer their work. There's no way I can equip myself to do a better job than they have done." Brinkley & Lohr, *N.Y. TIMES*; *cf. Final Judgment*, at 62–63.

In February 2000, four months before his final order splitting the company in two, the District Judge reportedly told *New York Times* reporters that he was "not at all comfortable with restructuring the company," because he was unsure whether he was "competent to do that." Brinkley & Lohr, *N.Y. TIMES*; *see also* BRINKLEY & LOHR, *U.S. v. MICROSOFT* 277–78 (same); *cf. AULETTA, WORLD WAR 3.0*, at 370 (comment by the Judge in April 2000 that he was inclining

toward behavioral rather than structural remedies). A few months later, he had a change of heart. He told the same reporters that “with what looks like Microsoft intransigence, a breakup is inevitable.” Brinkley & Lohr, N.Y. TIMES; *see also* BRINKLEY & LOHR, U.S. v. MICROSOFT 315. The Judge recited a “North Carolina mule trainer” story to explain his change in thinking from “[i]f it ain’t broken, don’t try to fix it” and “I just don’t think that [restructuring the company] is something I want to try to do on my own” to ordering Microsoft broken in two:

He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him: “How do you do it? How do you train the mule to do all these amazing things?” “Well,” he answered, “I’ll show you.” He took a 2-by-4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: “You just have to get his attention.”

BRINKLEY & LOHR, U.S. v. MICROSOFT 278. The Judge added: “I hope I’ve got Microsoft’s attention.” *Id.*; *see also* Grimaldi, WASH. POST (comments by the Judge blaming the break-up on Microsoft’s intransigence and on what he perceived to be Microsoft’s responsibility for the failure of settlement talks); Spiegel, FIN. TIMES (the Judge blaming break-up on Microsoft’s intransigence).

B. Violations of the Code of Conduct for United States Judges

The Code of Conduct for United States Judges was adopted by the Judicial Conference of the United States in 1973. It prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary. Every federal judge receives a copy of the Code, the Commentary to the Code, the Advisory Opinions of the Judicial Conference’s Committee on Codes of Conduct, and digests of the Committee’s informal, unpublished opinions. *See* II GUIDE TO JUDICIARY POLICIES AND PROCEDURES (1973). The material is periodically updated. Judges who have questions about whether their conduct would be consis-

tent with the Code may write to the Codes of Conduct Committee for a written, confidential opinion. *See* Introduction, CODE OF CONDUCT. The Committee traditionally responds promptly. A judge may also seek informal advice from the Committee's circuit representative.

While some of the Code's Canons frequently generate questions about their application, others are straightforward and easily understood. Canon 3A(6) is an example of the latter. In forbidding federal judges to comment publicly "on the merits of a pending or impending action," Canon 3A(6) applies to cases pending before any court, state or federal, trial or appellate. *See* JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 10.34, at 353 (3d ed. 2000). As "impending" indicates, the prohibition begins even before a case enters the court system, when there is reason to believe a case may be filed. *Cf.* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 54 (1973). An action remains "pending" until "completion of the appellate process." CODE OF CONDUCT Canon 3A(6) cmt.; Comm. on Codes of Conduct, Adv. Op. No. 55 (1998).

The Microsoft case was "pending" during every one of the District Judge's meetings with reporters; the case is "pending" now; and even after our decision issues, it will remain pending for some time. The District Judge breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case. Although the reporters interviewed him in private, his comments were public. Court was not in session and his discussion of the case took place outside the presence of the parties. He provided his views not to court personnel assisting him in the case, but to members of the public. And these were not just any members of the public. Because he was talking to reporters, the Judge knew his comments would eventually receive widespread dissemination.

It is clear that the District Judge was not discussing purely procedural matters, which are a permissible subject of public comment under one of the Canon's three narrowly drawn exceptions. He disclosed his views on the factual and legal

matters at the heart of the case. His opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth all dealt with the merits of the action. It is no excuse that the Judge may have intended to “educate” the public about the case or to rebut “public misperceptions” purportedly caused by the parties. See Grimaldi, WASH. POST; *Microsoft Judge Says He May Step down from Case on Appeal*, WALL ST. J., Oct. 30, 2000. If those were his intentions, he could have addressed the factual and legal issues as he saw them—and thought the public should see them—in his Findings of Fact, Conclusions of Law, Final Judgment, or in a written opinion. Or he could have held his tongue until all appeals were concluded.

Far from mitigating his conduct, the District Judge’s insistence on secrecy—his embargo—made matters worse. Concealment of the interviews suggests knowledge of their impropriety. Concealment also prevented the parties from nipping his improprieties in the bud. Without any knowledge of the interviews, neither the plaintiffs nor the defendant had a chance to object or to seek the Judge’s removal before he issued his Final Judgment.

Other federal judges have been disqualified for making limited public comments about cases pending before them. See *In re Boston’s Children First*, 244 F.3d 164 (1st Cir. 2001); *In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993). Given the extent of the Judge’s transgressions in this case, we have little doubt that if the parties had discovered his secret liaisons with the press, he would have been disqualified, voluntarily or by court order. Cf. *In re Barry*, 946 F.2d 913 (D.C. Cir. 1991) (per curiam); *id.* at 915 (Edwards, J., dissenting).

In addition to violating the rule prohibiting public comment, the District Judge’s reported conduct raises serious questions under Canon 3A(4). That Canon states that a “judge should accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard

according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.” CODE OF CONDUCT Canon 3A(4).

What did the reporters convey to the District Judge during their secret sessions? By one account, the Judge spent a total of ten hours giving taped interviews to one reporter. AULETTA, *WORLD WAR 3.0*, at 14 n.*. We do not know whether he spent even more time in untaped conversations with the same reporter, nor do we know how much time he spent with others. But we think it safe to assume that these interviews were not monologues. Interviews often become conversations. When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case. The published accounts indicate this happened on at least one occasion. Ken Auletta reported, for example, that he told the Judge “that Microsoft employees professed shock that he thought they had violated the law and behaved unethically,” at which time the Judge became “agitated” by “Microsoft’s ‘obstinacy’.” *Id.* at 369. It is clear that Auletta had views of the case. As he wrote in a *Washington Post* editorial, “[a]nyone who sat in [the District Judge’s] courtroom during the trial had seen ample evidence of Microsoft’s sometimes thuggish tactics.” Ken Auletta, *Maligning the Microsoft Judge*, WASH. POST, Mar. 7, 2001, at A23.

The District Judge’s repeated violations of Canons 3A(6) and 3A(4) also violated Canon 2, which provides that “a judge should avoid impropriety and the appearance of impropriety in all activities.” CODE OF CONDUCT Canon 2; *see also In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. Jud. Council 1995) (“The allegations of extra-judicial comments cause the Council substantial concern under both Canon 3A(6) and Canon 2 of the Judicial Code of Conduct.”). Canon 2A requires federal judges to “respect and comply with the law” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” CODE OF CONDUCT Canon 2A. The Code of Conduct is the law with respect to the ethical obligations of

federal judges, and it is clear the District Judge violated it on multiple occasions in this case. The rampant disregard for the judiciary's ethical obligations that the public witnessed in this case undoubtedly jeopardizes "public confidence in the integrity" of the District Court proceedings.

Another point needs to be stressed. Rulings in this case have potentially huge financial consequences for one of the nation's largest publicly-traded companies and its investors. The District Judge's secret interviews during the trial provided a select few with inside information about the case, information that enabled them and anyone they shared it with to anticipate rulings before the Judge announced them to the world. Although he "embargoed" his comments, the Judge had no way of policing the reporters. For all he knew there may have been trading on the basis of the information he secretly conveyed. The public cannot be expected to maintain confidence in the integrity and impartiality of the federal judiciary in the face of such conduct.

C. Appearance of Partiality

The Code of Conduct contains no enforcement mechanism. *See* THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 43. The Canons, including the one that requires a judge to disqualify himself in certain circumstances, *see* CODE OF CONDUCT Canon 3C, are self-enforcing. There are, however, remedies extrinsic to the Code. One is an internal disciplinary proceeding, begun with the filing of a complaint with the clerk of the court of appeals pursuant to 28 U.S.C. § 372(c). Another is disqualification of the offending judge under either 28 U.S.C. § 144, which requires the filing of an affidavit while the case is in the District Court, or 28 U.S.C. § 455, which does not. Microsoft urges the District Judge's disqualification under § 455(a): a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The standard for disqualification under § 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge's impartiality. *See In re Barry*, 946 F.2d at 914;

see also *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 24.2.1 (1996).

“The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). As such, violations of the Code of Conduct may give rise to a violation of § 455(a) if doubt is cast on the integrity of the judicial process. It has been argued that any “public comment by a judge concerning the facts, applicable law, or merits of a case that is *sub judice* in his court or any comment concerning the parties or their attorneys would raise grave doubts about the judge’s objectivity and his willingness to reserve judgment until the close of the proceeding.” William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 598 (1989). Some courts of appeals have taken a hard line on public comments, finding violations of § 455(a) for judicial commentary on pending cases that seems mild in comparison to what we are confronting in this case. See *Boston’s Children First*, 244 F.3d 164 (granting writ of mandamus ordering district judge to recuse herself under § 455(a) because of public comments on class certification and standing in a pending case); *In re IBM Corp.*, 45 F.3d 641 (granting writ of mandamus ordering district judge to recuse himself based in part on the appearance of partiality caused by his giving newspaper interviews); *Cooley*, 1 F.3d 985 (vacating convictions and disqualifying district judge for appearance of partiality because he appeared on television program *Nightline* and stated that abortion protestors in a case before him were breaking the law and that his injunction would be obeyed).

While § 455(a) is concerned with actual and apparent impropriety, the statute requires disqualification only when a judge’s “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Although this court has condemned public judicial comments on pending cases, we have not gone so far as to hold that every violation of Canon 3A(6) or every impropriety under the Code of Conduct inevitably destroys the appearance of impartiality and thus violates § 455(a).

See *In re Barry*, 946 F.2d at 914; see also *Boston's Children First*, 244 F.3d at 168; *United States v. Fortier*, 242 F.3d 1224, 1229 (10th Cir. 2001).

In this case, however, we believe the line has been crossed. The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge's impartiality. Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges secretly share their thoughts about the merits of pending cases with the press. Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. Discreet and limited public comments may not compromise a judge's apparent impartiality, but we have little doubt that the District Judge's conduct had that effect. Appearance may be all there is, but that is enough to invoke the Canons and § 455(a).

Judge Learned Hand spoke of "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire" LEARNED HAND, *THE SPIRIT OF LIBERTY* 132–33 (2d ed. 1953). Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the "cold neutrality of an impartial judge." Cold or not, federal judges must maintain the appearance of impartiality. What was true two centuries ago is true today: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." CODE OF CONDUCT Canon 1 cmt. Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

We recognize that it would be extraordinary to disqualify a judge for bias or appearance of partiality when his remarks arguably reflected what he learned, or what he thought he learned, during the proceedings. See *Liteky v. United States*, 510 U.S. 540, 554–55 (1994); *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992). But this "extrajudicial source" rule